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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

SECOND WALNUT CREEK MUTUAL, Plaintiff, vs. TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, FEDERAL INSURANCE COMPANY and DOES 1 through 20, inclusive, Defendants.	Case No.: CV08-2874 CW **NOTICE OF MOTION AND MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED (RULE 12(b)(6))** Hearing Date: August 14, 2008 Time: 2:00 p.m. Courtroom: 2

TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 14, 2008, at 2:00 p.m. or as soon thereafter as the matter may be heard in the above entitled Court, located at 1301 Clay Street, Oakland, CA 94612, defendant TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA ("Travelers") and FEDERAL INSURANCE COMPANY ("FEDERAL") will move the Court to dismiss the action pursuant to FRCP 12(b)(6) because plaintiff's complaint fails to state a claim upon which relief can be granted.

As discussed more fully in the accompanying Memorandum of Points and Authorities, plaintiff SECOND WALNUT CREEK MUTUAL seeks coverage for the costs of repair to the

portion of the subject Property's plumbing system that is located underground under the property insurance provided by Travelers and Federal, which is attached to the complaint as Exhibit A. Underground pipes are listed under the section of the involved property policy entitled "Property and Costs Not Covered" and, as a matter of law, are excluded from coverage. Consequently, the defendants' denial of those costs was proper and the complaint does not state a claim for breach of contract. Moreover, since the denial of coverage was proper, there can be no bad faith as a matter of law. Finally, since there is no bad faith, plaintiff is not entitled to recover its attorneys' fees or punitive damages as a matter of law. Consequently, plaintiff's Complaint for Breach of Contract, Breach of Implied Covenant Of Good Faith And Fair Dealing, Declaratory Relief And Punitive Damages should be dismissed without leave to amend.

The motion will be based on this Notice of Motion, the attached Memorandum of Points and Authorities filed herewith, and the pleadings and papers filed herein.

DATED: June 23, 2008

NEWTON REMMEL

By: Lenell Topol McCallum
Ronald F. Remmel
Lenell Topol McCallum
Attorneys for Defendant
FEDERAL INSURANCE COMPANY

DATED: June 23, 2008

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I. INTRODUCTION

Travelers and Federal paid the lion's share of the claim related to the fire loss at the property covered under the subject insurance policy, approximately $900,000. They did, however, decline to pay $70,000 relating to the costs incurred to repair underground pipes that were not included within the property or costs covered by the policy. Travelers and Federal have filed this motion to dismiss because the facts as alleged by plaintiff, when viewed in conjunction with the provisions of the property coverage provided by the property policy attached to the complaint, do not as a matter of law state a claim for breach of contract or for breach of the covenant of good faith and fair dealing. The refusal of Federal and Travelers to pay for the portion of the loss related to property that was not covered was both proper and reasonable. The complaint should be dismissed in that it states no facts that can legally support a claim for relief.

II. THE FACTS AS ALLEGED

As alleged in the plaintiff's complaint, a fire broke out at 3136 Tice Creek Drive, a two story building that was insured under a property insurance policy issued to plaintiff by Travelers, a copy of which is attached to the Complaint as Exhibit A. Travelers and Federal share coverage under the policy, each agreeing to pay fifty percent of the first $50,000,000 of loss. The fire caused damage to the building, including the plumbing system. Travelers and Federal responded to the plaintiff's claim, agreeing that some of the damage to the building was covered and paying a significant portion of the claim, including damage to a portion of the plumbing system. Compl., ¶14. Paragraph 15 sets forth the gravamen of the plaintiff's complaint against the defendant insurers:

> However, despite their obligation to pay for direct physical loss or damage to the Property, Travelers and Federal denied coverage to the Mutual for damage to the portion of the Property's plumbing system located underground. The Mutual paid approximately $70,000 to repair the damage to the portions of the plumbing system which Travelers and Federal determined were not subject to coverage under the Policy.

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Travelers and Federal declined to reimburse plaintiff for these costs for several reasons, only one of which will be addressed by this motion. Underground pipes or that portion of the plumbing system that was located below the slab of the apartment building are not covered by the insurance.

In the first cause of action, plaintiff asserts that the defendants' reliance on the policy provision excluding "underground pipes" as covered property was a breach of the provisions of the insurance contract. Compl., ¶¶ 23-26. Plaintiff also asserts a second cause of action for breach of the covenant of good faith and fair dealing. Compl., ¶¶ 27-31. The sole basis of the alleged "bad faith" is contained in paragraph 29 of the complaint as follows:

> Defendants breached these duties by refusing, without proper cause, to compensate Plaintiff for a loss covered by the Policy. Defendants' refusal to cover the loss was conscious and deliberate, and frustrated the agreed-upon purpose of the Policy – namely to provide coverage for losses to buildings or property owned by the Mutual. Defendants' refusal to provide coverage for the entire loss disappointed the reasonable expectations of the Mutual and its members, and deprived the Mutual of the benefits of the Policy."

The third cause of action is for declaratory relief in which plaintiff seeks a determination that the entire plumbing system serving plaintiff's building is Covered Property under the policy. Compl., ¶¶ 32-35. The relief requested by plaintiff includes all benefits due under the Policy, a judicial determination that the damage to the plumbing system is covered, consequential damages, attorneys fees and other expenses to obtain the benefits due, exemplary and punitive damages and attorneys fees and costs of suit incurred in this action. Compl., p. 7.

III. THE POLICY

The relevant sections of the involved property insurance, attached to the Complaint as Exhibit A, state:

> A. INSURING AGREEMENT
>
> The Company will pay for direct physical loss of or damage to Covered Property at the premises … caused by or resulting from any Covered Cause Of Loss. Covered Cause of Loss means risks of direct physical loss unless the loss is excluded in Section D., Exclusions; limited in Section E; Limitations; or excluded or limited in the Supplemental Coverage Declarations or by endorsements.

B. COVERAGE

> Coverage is provided for Covered Property and Covered Costs and Expenses, as described in Sections b.1 and B.2,for which the Insured has an insurable interest, unless excluded in Section C., Property and Costs Not Covered…

(Exhibit A, Property Coverage Form, Page 1 of 14.) Thus, for there to be coverage, it must involve Covered Property and Covered Costs and Expenses, and any damage must have resulted from a Covered Cause of Loss. If either the property or costs are not covered or if the damage did not result from a Covered Cause Of Loss, there is no coverage. [1]

As referenced in Section B, Coverage, quoted above, Section C of the policy expressly enumerates those items for which there is no coverage; they are included as Property and Costs Not Covered:

> Unless the following property or costs are added by endorsement to this Coverage Form, Covered Property and Covered Costs and Expenses do not include:…
>
> 11. Underground tanks, pipes, flues, drains or tunnels, all whether or not connected to buildings, mines or mining property; …

(Exhibit A, Property Coverage Form, Page 7 of 14 and Page 8 of 14.) Plaintiff asserts that the plumbing system is comprised of fixtures and that fixtures are specifically covered under the policy. Compl., ¶19. It then contends that this provision excluding "underground pipes" is "ambiguous" because it also refers to non-residential building components, such as flues and tunnels, and because it relates to mining or industrial operations. Compl., ¶20. By this motion, Travelers and Federal are asking the Court to examine the policy and determine that the provision at issue is clear and unambiguous as a matter of law and that it applies to preclude coverage for any damage to underground pipes on the plaintiff's property.

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[1] The claim for the costs to repair the underground plumbing system was also denied on the grounds that it was not damaged by a Covered Cause Of Loss. The insurers' expert determined that the damages found on the waste piping below the slab of the building were the result of improper installation that occurred when the pipe was originally installed and were not the result of the fire. It was the opinion of the plaintiff's expert that the failures below the slab were the result of the excessive heat from the fire.

IV. LEGAL ARGUMENT

A. Rule 12(b)(6) Legal Standard.

A motion to dismiss should be granted if the complaint fails to allege facts that can legally support a claim for relief. In re Stac Electronics Securities Litig., 89 F.3d 1399 (9th Cir. 1996) (motion to dismiss must accept allegations of material fact, but not conclusory allegations of law). Nevertheless, a "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957) The court construes the nonmoving party's allegations of a material fact as true and construes them in the light most favorable to the nonmoving party. Nieto v. Ecker, 845 F.2d 868, 870 (9th Cir. 1988)

In order to survive the Rule 12(b)(6) standard, a complaint must be anchored in a bed of facts. "A court in assessing a claim's sufficiency has no obligation to take matters on blind faith; despite the highly deferential reading which we accord a litigant's complaint under Rule 12(b)(6), we need not credit bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, or outright vituperations." Miranda v. Ponce Federal Bank, 948 F.2d 41, 44 (1st Cir. 1991). Said in another way, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim. Epstein v. Washington Energy Company, 83 F.3d 1136, 1139 (9th Cir. 1996).

B. The Policy Provision At Issue Is Not Ambiguous.

Interpretation of an insurance contract, like any contract, is governed by the mutual intent of the parties at the time they form the contract. AIU Ins. Co. v. Superior Court, 51 Cal.3d 807, 821-822 (1990). The parties' intent is found if possible, solely in the contract's written provisions. Id., at p. 822. "The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' [citation], controls judicial interpretation. [Citation.]" Ibid. Thus, if a layperson would give the contract language an unambiguous meaning, we apply that meaning. Ibid. Only these basic principles are needed to interpret

contract language that is clear and unambiguous. Shell Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal.App.4th 715, 737 (1993). Thus, "when the terms of an insurance policy are plain and explicit, the court will indulge in no forced construction so as to cast unassumed liability on an insurance company." Jensen v. Traders & Gen'l Ins. Co., 52 Cal.2d 786, 791 (1959). Similarly, where there is no doubt in the meaning of the policy language, courts will not strain to find ambiguities. Hauser v. State Farm Mut. Auto. Ins. Co., 205 Cal.App.3d 843, 846 (1988); Barrett v. Farmers Ins. Group, 174 Cal.App.3d 747, 752 (1985).

Simply stating that a policy provision is ambiguous, as plaintiff has in its complaint, does not make it so. Whether language in a contract is ambiguous is a question of law. Producers Dairy Delivery Co. v. Sentry Ins. Co., 41 Cal.3d 903, 912 (1986). The rules for recognizing ambiguity are straightforward. Ambiguity exists when an insurance policy provision is susceptible to two or more constructions that are (1) reasonable and (2) not based on strained interpretation of policy language. Shell Oil Co. v. Winterthur Swiss Ins. Co., supra, 12 Cal.App.4th 715, 737; Producers Dairy Delivery Co. v. Sentry Ins. Co., supra, 41 Cal.3d 903, 912.

The policy language under scrutiny here is plain and straightforward. The provision states that covered property does not include "underground tanks, pipes, flues, drains or tunnels, all whether or not connected to buildings, mines or mining property". Plaintiff contends that it is ambiguous in light of the insuring agreement which states that the policy covers fixtures. This is not a viable argument. "[A] specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, even though the latter, standing alone, would be broad enough to include the subject to which the more specific provision relates." Furtado v. Metropolitan Life Insurance Co., 60 Cal.App.3d 17, 25 (1976). See also California Packing Corp. v. Transport Indemnity Co., 275 Cal.App.2d 363, 370 (1969) ("Where general and specific provisions of an insurance policy differ as to its coverage or applicability, the specific provisions will prevail"). In other words, "general expressions of coverage in the insuring clause of an insurance policy do not render ineffective the limitations provided by

exclusions stated in subsequent clauses of the policy." 13 J. Appleman, Insurance Law and Practice § 7387, at 181 (1976). The specific provision excluding underground pipes is not rendered ambiguous because the policy covers fixtures generally. The specific exclusion governs and underground pipes are not covered property.

Plaintiff also states the provision is ambiguous in that the provision "refers to non-residential building components such as flues and tunnels" and that it "clearly relates to mining or industrial operations, particularly when construed in the context of the circumstances of this particular case." Compl.,¶ 20. In paragraph 21, plaintiff contends that "the policy was obtained to provide coverage for numerous buildings within the Rossmoor development," and that "the purpose of the Policy is frustrated if some plumbing systems are covered and portions of some are not." In all of the foregoing, plaintiff offers no alternative reasonable meaning.

Any alternative interpretation urged by plaintiff must be one to which the policy is reasonably susceptible. The exclusion at issue admits of only one interpretation: the policy, which applies to the covered property, does not cover any damage or repair to underground pipes whether or not they are connected to buildings and whether those buildings are residential, commercial or industrial. Not only does the exclusion for underground pipes apply to buildings, it also applies to mines and mining property. The fact that the provision also excludes various underground non-residential components and applies to mines and mining property as well as buildings does not make it ambiguous. Plaintiff incurred costs to repair certain underground pipes associated with its apartment building and those costs are not covered.

Finally, in paragraph 22 of the complaint, it is stated that plaintiff "reasonably expected that all damage to the Covered Property caused by a fire would be covered" and that it "had no reason to believe that an exclusionary clause regarding mining operations would result in a denial of coverage." The doctrine that an insurance policy should be interpreted to give effect to the insured's reasonable expectations applies only when an ambiguity exists. Producers Dairy Delivery Co. v. Sentry Ins. Co., supra, 41 Cal.3d 903, 912; Schrillo Co. v. Hartford

Accident & Indemnity Co., 181 Cal.App.3d 766, 775-776 (1986). In this case, there is no ambiguity, and accordingly, the reasonable expectation of coverage doctrine is not applicable. There being no ambiguity in the language of the policy presently under consideration, the court should give the unambiguous terms of the policy effect.

C. Plaintiff's First Cause of Action For Breach of Contract Fails to State Facts Sufficient to Constitute a Cause of Action.

Plaintiff attempts to state a cause of action for breach of contract in its first cause of action. In order to state a cause of action for breach of the insurance contract, it must plead the relevant, material terms of the contract, their performance or excuse for nonperformance of the relevant terms, defendant's breach of the relevant terms and damages to the plaintiffs which were caused by defendant's breach. Acoustics, Inc. v. Trepte Construction Co., 14 Cal.App.3d 887, 913 (1971).

Plaintiff seeks recovery of approximately $70,000 it incurred to repair the damage to the underground portions of the plumbing system which defendants determined were not subject to coverage under the Policy. The obligations of Travelers and Federal pursuant to the insurance contract attached to the complaint as Exhibit A were not breached. Among other reasons, defendants denied coverage on the basis of a provision which states that "[u]nderground tanks, pipes, flues, drains or tunnels, all whether or not connected to the buildings, mines or mining property" are excluded as "Property and Costs Not Covered". This provision is clear and unambiguous for the reasons discussed above and it has been found to be unambiguous and applied by a variety of courts in other jurisdictions.

In General Accident Ins. Co. v. Unity/Waterford-Fair Oaks, 288 F.3d 651 (5th Cir. 2002), an apartment complex owner brought an action against its commercial property insurer to recover for alleged damage to the foundations of its buildings caused by seepage or leakage from underground sewer and water pipes, and for the costs of accessing and repairing that underground plumbing. The Circuit Court affirmed the order granting summary judgment in favor of the insurer finding that the policy did not cover these losses since the policy expressly excluded "underground pipes, flues or drains" from covered property. The policy therein

provided commercial property insurance against "direct physical loss of or damage to Covered Property" resulting from "covered causes of loss" to buildings and business income. Id. at 653-654. The policy also provided that covered property did not include "underground pipes, flues and drains" Id. at 654. The court held that the underground pipes were never included as covered property. It rejected the insured's argument that the damage was covered since it occurred as a result of an exception to an exclusion for certain specified causes of loss. Id. at 655-656. This did not have the effect of extending coverage to property that was not covered in the first place. Id. The court also refused to consider parol evidence to determine the meaning of the contract since the policy was not ambiguous in any pertinent sense. Id. at 657.

Monju v. Continental Casualty Co., 487 So.2d 729 (1986) involved a claim by apartment building owners arising out of the repair of a broken pipe and a separation of the pipe in the building's sewer system. The provisions of the All Risk Building Form at issue therein provided coverage to buildings or structures, including fixtures, machinery and equipment constituting a permanent part of and pertaining to the service of the buildings. The policy also contained provisions with respect to "property not covered" which removed from coverage "...underground flues, pipes, wiring and drains...." Id. at 731. The Louisiana Court of Appeal held that the words of the contract are unambiguous and that the underground pipes and drains are clearly not covered by the policies. Ibid. The insured building owners could not recover expenses in repairing those items.

Finally, in Weldon v. Commercial Union Assurance Co., 103 N.M. 522, 710 P.2d 89 (1985), the court reversed the trial court's ruling in favor of the insured and held that the insurer was not liable for the costs to repair a gas leak that developed underground because the policy unambiguously stated that it did not cover underground pipes and flues. The property insurance therein was issued to Weldon for coverage of the De Anza Motor Lodge. Section I of the policy defined covered property to include buildings or structures as well as "fixtures, machinery and equipment constituting a permanent part of and pertaining to the service of the building(s)." Id. at 523. Section II of the policy defined property not covered and stated that it

did not cover, among other things, "pilings, piers, pipes, flues and drains which are underground." Ibid. There was no dispute that the gas pipeline was a fixture constituting a permanent part of and pertaining to the service of the building. Weldon argued, as does the plaintiff herein, that Sections I and II of the policy when read together create an ambiguity. Id. at 524. The court, relying on California decisions regarding policy interpretation, agreed with the insurer that the policy was not ambiguous. "Section II [the exclusion for "pilings, piers, pipes, flues and drains which are underground"] is not fairly susceptible of two different constructions by reasonably intelligent men." Ibid. Section II, the specific provision which denied coverage of underground pipes and flues, governed over Section I, the insuring provision. Ibid. "Pipes come within the definition of covered property under Section I except when they are underground, as excluded in Section II." Ibid.

The provision at issue is clear and unambiguous and applies in this instance to preclude coverage for plaintiff's costs to repair the portion of its plumbing system located underground, i.e. pipes that are located below the slab of its apartment building. The determination that these costs were not covered by Travelers and Federal was proper under the policy and, as a matter of law, does not constitute a breach of contract.

D. Plaintiff's Second Cause of Action For Bad Faith Fails to State Facts Sufficient to Constitute a Cause of Action.

In its second cause of action, plaintiff alleges that Travelers and Federal have breached their covenant of good faith and fair dealing "by refusing, without proper cause, to compensate Plaintiff for a loss covered by the Policy." Compl., ¶ 29, lines 7-8. To establish a bad faith claim, the insured must show that (1) benefits due under the policy were withheld and (2) the reason for withholding the benefits was unreasonable or without proper cause. Neal v. Farmers Ins. Exchange, 21 Cal.3d 910, 920 (1978). "It is now clear under California law that an insurer's erroneous failure to pay benefits under a policy does not necessarily constitute bad faith entitling the insured to recover tort damages. '[T]he ultimate test of [bad faith] liability in the first party cases is whether the refusal to pay policy benefits was unreasonable.'" Opsal v. United Services Auto. Assn., 2 Cal.App.4th 1197, 1205 (1991). A first party suit for breach of

the covenant against the insurer "exists to assure the insurer makes prompt payment of claims to the insured. The substance of a bad faith action in these first party matters is the insurer's unreasonable refusal to pay benefits under the policy." Gourley v. State Farm Mut. Auto. Ins. Co., 53 Cal.3d 121, 127 (1991).

"The precise nature and the extent of the duty imposed by the implied [covenant of good faith and fair dealing] will depend on the contractual purposes." Amadeo v. Principal Mut. Life Ins. Co., 290 F.3d 1152, 1161 (9th Cir.2002)) (quoting Egan v. Mutual of Omaha Ins. Co., 24 Cal.3d 809, 818, (1979)). Thus, "if there is 'no potential for coverage' under the policy, a claim for bad faith cannot be brought." Amadeo v. Principal Mut. Life Ins. Co., supra, 290 F.3d 1152, 1159 (citing Waller v. Truck Ins. Exch., 11 Cal.4th 1, 36 (1995)) ("[I]f there is no potential for coverage ... there can be no action for breach of the implied covenant of good faith and fair dealing because the covenant is based on the contractual relationship between the insured and the insurer.")). Here, there is no coverage under the policy for the costs to repair underground pipes, which are excluded under the policy, and thus no claim for bad faith can be brought.

Moreover, a breach of the implied covenant involves something more than a breach of the contract or mistaken judgment. Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co., 90 Cal.App.4th 335, 345 (2001). It must be alleged that the insurer failed or refused to discharge its contractual duties not because of an honest mistake, bad judgment, or negligence, "but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement." Id. at p. 346. California law provides that a cause of action for bad faith must allege specific facts of misconduct. So, for example, in Spindle v. Northwestern/Pacific Indemnity Group, 89 Cal.App.3d 706 (1979), the court sustained a demurrer to the insured's bad faith action against the insurer. The insured alleged that the insurer failed to advise of a conflict of interest, failed to provide separate counsel, controlled defense of the underlying action and refused to settle the underlying action. Id. at

714. The court held that this was an insufficient allegation of bad faith, stating, "[p]laintiff has not stated a cause of action for bad faith in any of these alleged breaches." Id.

The allegations of plaintiff's complaint against Federal do not begin to rise to the level of alleged wrongdoing in the Spindle matter. Thus, they are insufficient as a matter of law to support a cause of action for breach of the implied covenant of good faith and fair dealing. As discussed, supra, plaintiff alleges merely that Federal relied on a clear and unambiguous provision of the policy, which excludes underground pipes from covered property, to decline the portion of its claim seeking costs to repair the building's underground plumbing system. Plaintiff has not alleged, nor can it allege, any unreasonable or improper conduct by Federal depriving it of the benefits of the property insurance. To the contrary, Federal has paid those costs that were covered under the policy and denied those that were excluded. It has done everything consistent with, and within the bounds of, the insurance contract to accommodate plaintiff in the claims process. The complaint does not state facts that support the second cause of action for bad faith.

1. Plaintiff Is Not Entitled To Punitive Damages As A Matter of Law.

In connection with the second cause of action for breach of the covenant of good faith and fair dealing, plaintiff alleges that defendants' acts "were without justification, willful, wanton, malicious, fraudulent and oppressive" and that they are guilty of "oppression, fraud and malice." Compl., ¶31, lines 19-21. Under California Civil Code Section 3294, exemplary damages are only available "in an action for breach of an obligation not arising from contract." See, Fletcher v. Western National Life Ins. Co., 10 Cal.App.3d 376, 400 (1970) ("[I]t is well settled that punitive damages may not be recovered for breach of contract, even if the breach is willful, fraudulent or coupled with evil intent"). "Punitive damages aren't available in California for simple breaches of contract, no matter how willful . . . [T]he breach must have been tortious, and the breaching party must have been guilty of oppression, fraud or malice . . . Put another way, punitive damages are recoverable only where the defendant 'act[ed] with the intent to vex, injure, or annoy.'" Slottow v. American Casualty Company, 10 F.3d 1355, 1361

(9th Cir. 1993). As set forth above, since there has been no breach of contract and no breach of the implied covenant of good faith and fair dealing, the plaintiff is not entitled to an award of punitive damages.

2. There Is No Basis For An Award of Attorneys' Fees.

In connection with the second cause of action, plaintiff seeks recovery of attorneys' fees. Compl., ¶30, line 16. It is axiomatic that, in California, a party may not recover attorneys' fees in an action for breach of an insurance contract unless that party can plead and ultimately prove a valid cause of action for breach of the covenant of good faith and fair dealing. Brandt v. Superior Court, 37 Cal.3d 813, 817 (1985). Because plaintiff did not sufficiently allege a bad faith cause of action as outlined in this memorandum, there is no basis upon which attorneys' fees can be awarded.

V. CONCLUSION

For the foregoing reasons, defendants Travelers and Federal respectfully request that their motion to dismiss the Complaint filed herein by plaintiff be granted. The complaint is devoid of facts supporting the causes of action for breach of contract and bad faith. The costs incurred by plaintiff for the repair of the portion of the Property's plumbing system that was located underground were excluded by the Policy.

DATED: June 23, 2008

NEWTON REMMEL

By: _____
Ronald F. Remmel
Lenell Topol McCallum
Attorneys for Defendant
FEDERAL INSURANCE COMPANY

DATED: June 23, 2008

RUDLOFF WOOD & BARROWS LLP

By: _____
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TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA